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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen

GUARDANT HEALTH, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. 3:21-cv-4062 EMC
)	
NATERA, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Friday, July 26, 2024

TRANSCRIPT OF PROCEEDINGS BY ZOOM WEBINAR

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UNITED STATES COURT REPORTERS

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Friday - July 26, 2024

3:04 p.m.

P R O C E E D I N G S

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THE CLERK: These proceedings are being recorded by this Court. Any other recording of this proceeding either by audio, video, including screen shots or any other copying of the hearing is strictly prohibited.

This Court is now in session. The Honorable Edward M. Chen presiding.

The Court is calling the case Guardant Health, Inc. versus Natera, Inc., case number 21-4062.

Counsel, please state your appearance for the record beginning with the plaintiff.

MR. PERLOFF: Good afternoon -- go ahead, Chase.

MR. SCOLNICK: Good afternoon, Your Honor. Chase Scolnick of Keller/Anderle on behalf of Guardant Health.

THE COURT: All right. Good afternoon.

MR. PERLOFF: Good afternoon. Saul Perloff with A & O Shearman on behalf of Guardant Health. And with me today is Chris LaVigne.

THE COURT: All right. Thank you, Mr. Perloff.

I can't hear you, Mr. Johnson, for some reason.

MS. MAROULIS: Good afternoon, Your Honor. Looks like Mr. Johnson is having some mic troubles.

I'm Victoria Maroulis, counsel for Natera. I'm here with

1 Kevin Johnson, Andrew Bramhall, Brian Cannon, Ryan Landes, and
2 Elle Wang.

3 **THE COURT:** All right. Good afternoon, everyone.

4 All right. So I guess I'd like, after all the briefing
5 and everything else, I'd like a simple explanation from
6 Natera's counsel as to how is it that in response to document
7 requests we get -- and I believe it's dozens, I think it's
8 represented to be like 70-something documents evidencing
9 correspondence between Doc Hochster and people at, I'll just
10 say COBRA, and when that same document request was propounded
11 upon Natera, they came up with nothing. How could that be?
12 What's the simple explanation?

13 **MR. LANDES:** Your Honor, this is Ryan Landes on behalf
14 of Natera.

15 So the simple explanation, Your Honor, Dr. Hochster
16 testified to this in his deposition, is that he did not
17 remember having these emails.

18 **THE COURT:** Okay. Let's stop right there.

19 **MR. LANDES:** Sure.

20 **THE COURT:** Honestly, you think that's credible?
21 After all this exchange, something of this import, his depth of
22 involvement, including suggesting a substitution of his
23 company's product in the study, and his critique and his
24 questions and his closeness, his colleagues running that, that
25 he had no memory, and he's a retained expert in this case; you

1 honestly believe that?

2 **MR. LANDES:** I do, Your Honor.

3 **THE COURT:** Well, you're a fool.

4 Okay. What's your other explanation that he didn't
5 remember?

6 So even if he didn't remember, you have a duty to search,
7 and you as counsel have a duty to instruct your client to do a
8 search and not rely on memory. What happened?

9 **MR. LANDES:** He did a search, Your Honor. And,
10 again --

11 **THE COURT:** How many times?

12 **MR. LANDES:** He did an ESI search on his computer
13 once.

14 **THE COURT:** A singular search, correct?

15 **MR. LANDES:** Yes, Your Honor.

16 **THE COURT:** Not again, not multiple, a singular
17 search.

18 **MR. LANDES:** So, Your Honor, what he did when he
19 received the subpoena, we spoke with him numerous times to ask
20 whether he remembered having communications with NRG, with the
21 principal investigators or with Natera. He said he did not
22 recall any such communications. We answered that in a
23 subpoena.

24 Following meet and confer, Guardant's counsel asked us to
25 run a search on his email docs with particular search terms.

1 We went back and we did that. He searched his computer for
2 those emails. They did not come up.

3 As he explained in his deposition, he deletes his emails
4 on an ongoing basis. As Magistrate Judge Kim recognized at the
5 hearing, this is not someone who is a -- someone who preserves
6 all of his documents for eternity. He did not have them.

7 **THE COURT:** So you believe that he ran the search but
8 all responsive documents had been deleted?

9 **MR. LANDES:** Yes, Your Honor.

10 **THE COURT:** And have you asked him to run or have you
11 sent a forensic expert to go back and look to see whether in
12 fact that is the case?

13 **MR. LANDES:** We have not sent a forensic expert to see
14 whether the emails were deleted, because they were retrieved
15 from Rutgers. The emails are available.

16 **THE COURT:** Well, that's not the question. You don't
17 get out of discovery just because the propounding party also
18 happened to get some documents from a third party. It may be
19 relevant to state of mind and other reasons. It doesn't
20 absolve the responder, especially when they're a party in the
21 case, to say: Oh, you already got the documents.

22 In fact, you have to respond even if you know that the
23 propounding party has the documents. Because the fact that you
24 may have certain documents, even though the other side has it,
25 the fact is that possession may be relevant in some cases.

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1 So why hasn't there been -- is that the only reason why
2 there has not been a followup, is because, well, Rutgers
3 already produced a bunch of documents?

4 **MR. LANDES:** I think that that's the primary reason,
5 Your Honor. And if, you know, if there's any need to go back
6 and search his personal computer more extensively, that's
7 something that we could do.

8 **THE COURT:** What do you know about the deletion
9 policy? Is there an automatic process that these are on -- are
10 they on a server, are they on a company server or some company
11 server, or is it all on his personal computer? Does he have a
12 purging -- a periodic purging or something or does he just ad
13 hoc delete things as his computer gets filled?

14 **MR. LANDES:** It's the latter, Your Honor. That's what
15 he testified at his deposition, is that his email box has
16 limited space in it, and so he reviews his emails in the
17 morning and typically deletes them as he goes.

18 **THE COURT:** So --

19 **MR. LANDES:** And Rutgers -- sorry. I didn't mean to
20 interrupt, Your Honor.

21 **THE COURT:** No. And he intends to delete as he goes,
22 so there's -- if there's -- there's no older emails in his
23 computer that are, say, six months or more or older?

24 **MR. LANDES:** There may be some, but at least as to
25 these they did not come up when he searched, was his testimony.

1 **THE COURT:** Well, I find that a little odd, because
2 these are -- if it was one or two emails, but given the number
3 of emails, they appear to be at least in the dozens, it's hard
4 to believe that none of them, each and every one of them would
5 have been -- would have been erased or deleted.

6 **MR. LANDES:** I -- that was his testimony, Your Honor.
7 I understand that you may not find it credible. I, again, I
8 spoke with him numerous times. I've seen his deposition
9 testimony, and I believe it to be the case.

10 He is -- he is a practicing oncologist. He is not a party
11 in this case, and he was going about his practice.

12 And just to be clear, Your Honor, the number of emails
13 were the total number of emails that he had that mentioned
14 COBRA in any way, so it included general distributions or
15 circulars or things like that. The number of actual emails
16 with, to use your summary word, the COBRA people, I think was
17 on the order of 10 to 15.

18 **THE COURT:** Well, let me ask you, there seems to be
19 some dispute about that.

20 Is that accurate, Mr. Perloff, or whoever on your side is
21 going to respond?

22 **MR. SCOLNICK:** No, Your Honor. This explanation is at
23 odds with -- in addition to being at odds with common sense, it
24 also contradicts Dr. Hochster's earlier testimony in his first
25 deposition.

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1 In that deposition he seemed to acknowledge that he did
2 preserve the emails, and that the emails outdate his memory,
3 and that he would have to go back in time in his email inbox to
4 see with whom at Guardant and with whom at Natera he
5 communicated with.

6 So this is a new explanation or a new policy somehow that
7 just came up when we requested documents for COBRA.

8 **THE COURT:** But what about the representation about
9 the number of documents that would be responsive with the COBRA
10 search?

11 **MR. SCOLNICK:** My last count was about 70 documents,
12 Your Honor. There are a number of emails in there.

13 But, again, I want to reiterate --

14 **THE COURT:** Why am I hearing this disparity for
15 something that should not be hard to figure out? Is it 10 or
16 is it 70?

17 **MR. LANDES:** Your Honor, if I could clarify. There
18 were 70 emails that were produced from Rutgers that hit on
19 search terms. Not all of them were communications with
20 COBRA -- with NRG or with COBRA PIs. That was the smaller
21 number that I was referencing.

22 **THE COURT:** Okay.

23 **MR. SCOLNICK:** Your Honor, I think there was about two
24 dozen emails with Natera, NRG, Dr. Morris and Dr. Boland, who
25 were all involved in the COBRA study.

1 **MR. PERLOFF:** That seems about right.

2 And just to clarify, remember what we received from
3 Rutgers were only those emails during a specific time period,
4 and only if they were sent from or received or sent to a
5 specific email address. So that's all that Rutgers produced to
6 us.

7 **THE COURT:** And that specific email address is
8 Dr. Hochster's email address?

9 **MR. PERLOFF:** Yes. And then we specified recipients
10 and senders also by specific email addresses.

11 **THE COURT:** And that period of time was limited to
12 some point in 2023?

13 **MR. PERLOFF:** I believe it would have been either June
14 the 1st or the middle of June of 2023, I believe, through March
15 of 2024. And that was kind of the problem because, Your Honor,
16 Dr. Hochster stated at his deposition that when he ran that
17 search, he did find COBRA-related documents, and he said they
18 referenced the fact that COBRA was open and running at Rutgers,
19 which by definition would have been earlier, before. So he
20 somehow had earlier COBRA documents but not COBRA documents
21 during this crucial time period.

22 I apologize, Chase.

23 **THE COURT:** So there -- so what's missing at this
24 point, from your perspective?

25 **MR. SCOLNICK:** Well, Your Honor, a number of things

1 are missing. We only have limited emails between Dr. Hochster
2 and a small subset of people. More recipients would be
3 relevant and necessary, also a greater timeline, a timeline
4 going back probably beginning of COBRA.

5 And in addition --

6 **THE COURT:** Well, when is that, when you say the
7 beginning of COBRA?

8 **MR. SCOLNICK:** I would say 2017. We have January 1st,
9 2017.

10 **THE COURT:** Well, why -- but when the data started
11 coming in, when was it that the actual data started being
12 accumulated?

13 **MR. SCOLNICK:** It was -- my understanding is 2023,
14 Your Honor.

15 Is that right, Saul?

16 **MR. PERLOFF:** It would have been May or June of 2023
17 when they began to do the -- collect the data and run the tests
18 for the interim analysis.

19 **THE COURT:** Well, why would stuff back from 2017 have
20 any -- why is that likely to bare some information that would
21 be relevant to this case?

22 **MR. SCOLNICK:** Well, Your Honor, you now see
23 Dr. Hochster's involvement on behalf of Natera working as an
24 agent to manipulate and to influence COBRA, and there's no
25 telling how far back that goes. But it would certainly be

1 relevant to the trajectory of COBRA, what happened in COBRA,
2 his bias, his honesty or dishonesty, and his interest in the
3 case.

4 **THE COURT:** Well, let's take the first one, trajectory
5 of COBRA. What information do you have that, notwithstanding
6 his efforts, that he actually had some influence on the study
7 of the design or the trajectory or the analysis of the
8 information?

9 **MR. SCOLNICK:** Well, Your Honor, the problem is we
10 don't know what we don't know.

11 **THE COURT:** Well, what do you have so far?

12 **MR. SCOLNICK:** What we have so far is Dr. Hochster, at
13 Natera's request, going out and communicating with the primary
14 investigators for COBRA, trying to denigrate Guardant, and
15 trying to influence the trajectory of COBRA, and trying to move
16 the samples over to Signatera for Natera's benefit - all the
17 while not disclosing to anybody at NRG, not disclosing to his
18 colleagues that he was allied with and on the payroll of Natera
19 and working as their --

20 **THE COURT:** Is there any evidence that the COBRA
21 authors and those that are involved in the study acceded to his
22 requests, recommendations?

23 **MR. SCOLNICK:** Well, Your Honor, it's circumstantial,
24 but, yes, I think that there is an evidentiary record that we
25 can draw conclusions from, that they were engaging with him,

1 and they --

2 **THE COURT:** What's an example of something where the
3 trajectory was altered?

4 **MR. SCOLNICK:** Well, you have them -- you have them
5 responding to Dr. Hochster, saying yes, we're interested in
6 having further conversations, right? And that's in response to
7 Dr. Hochster reaching out and encouraging them to do a
8 mulligan, and to move the samples back over to Natera and --

9 **THE COURT:** That never happened, did it?

10 **MR. SCOLNICK:** No. No.

11 **MR. PERLOFF:** Your Honor --I'm sorry.

12 **MR. SCOLNICK:** Your Honor, it's possible that without
13 Dr. Hochster's influence, interference, that COBRA would have
14 gone a different way.

15 **THE COURT:** What makes you say that?

16 **MR. SCOLNICK:** At this point, Your Honor, it's -- we
17 don't have all the information. Had we had this information
18 early enough in discovery when the Court required it to be
19 turned over, perhaps we could have explored it, perhaps we
20 could have taken additional depositions of people to figure
21 out, to get to the bottom of it. But this was all information
22 that was turned over to us after the close of discovery, and
23 that's the problem we're in. We're left speculating here.

24 **THE COURT:** Well, what discovery did you have with
25 respect to the COBRA authors?

1 **MR. SCOLNICK:** I'm sorry, Your Honor?

2 **THE COURT:** When we -- when this thing first arose and
3 we debated whether I would continue the trial, give you more
4 time, extend the discovery deadline, Mr. Perloff said, well,
5 we're going to need to contact the COBRA authors and designers
6 and talk with them and get to the bottom, you know, how hard
7 it's going -- we have to go through a couple different
8 channels, blah, blah, blah. I mean, isn't that the direct way
9 to find out what happened with respect to the trajectory? I
10 mean, you were given time to do that.

11 **MR. PERLOFF:** Yes, Your Honor.

12 If I might, Chase, if you don't mind.

13 We reached out to NRG and sent them a subpoena about the
14 same time that we sent the subpoena to Rutgers. We received
15 the documents just recently, I think perhaps two weeks ago.
16 It's not complete. What's notably missing from the NRG
17 documents are their communications with Dr. Hochster. They
18 sent one and only one, even though we know there are multiples.
19 I've written back to them and asked them to go back and to
20 update their production. We're still waiting on that.

21 I just wanted to mention one thing. We do know, Your
22 Honor, a couple of things that suggest Dr. Hochster's
23 influence. If you -- you've seen the emails he sent. This was
24 not emails from a stranger to a stranger. He's referring to
25 these people by first name. He had a relationship because he

1 is a prominent oncologist.

2 The recipients, the people at NRG, don't know he's working
3 for Natera. But we know, for example, that NRG, the study
4 investigators in Guardant were talking about a path forward
5 even after August when they announced that it was closed.

6 But what we now -- but today, as of today that path
7 forward has not happened, and we're still trying to get to the
8 bottom of it. We've never been able to -- if we had known his
9 involvement, we could have targeted our searches, including on
10 Natera, to find out more about who was doing what and how it
11 was being influenced. But as Mr. Scolnick says, we don't know
12 what we don't know, but it wasn't for lack of trying.

13 **THE COURT:** Well, I'm not saying it was lack of
14 trying. I'm saying it was lack of evidence. It seems to be
15 speculative when you say the trajectory of the study.

16 I know you want to -- you'd like to exclude this study,
17 you'd like to undermine this study, it's not a great study for
18 you, but I'm not seeing -- this go to the question of prejudice
19 and what kind of sanctions should be involved, if any.

20 And if -- unless the study itself and the results that
21 were obtained were somehow tainted as a result, and the
22 evidence that you were seeking to get and has not been given to
23 you would demonstrate that taint, then I don't, frankly, see a
24 remedy that leads to the total exclusion of the COBRA study.

25 **MR. PERLOFF:** Well, we would want and need all of the

1 documents that we do not have. And I'll let Chase go into that
2 more.

3 **MR. SCOLNICK:** Your Honor --

4 **MR. CANNON:** May I jump in for a moment?

5 **THE COURT:** All right.

6 **MR. CANNON:** Thanks, Your Honor.

7 I was part of those discussions with Your Honor and
8 Mr. Perloff back in February about the scope of discovery and
9 opening up a little bit more discovery into COBRA. And I think
10 it's true, Your Honor pointed this out, there have been no
11 subpoenas sent for depositions from investigators like
12 Dr. Morris or Dr. Boland from the Guardant side. So, you know,
13 that was a little bit on them to substantiate that, I'll just
14 call it speculation, about any influence that Dr. Hochster had.

15 And I have to say, it's not like there was any influence
16 beforehand. The communications at issue were after the
17 closure. It was the summer of 2023. So, I mean, there's
18 speculation on the Guardant side about, hey, there was some
19 influence on the study design. I believe that's absolutely not
20 true. I'm not aware of any evidence that Dr. Hochster was
21 involved in study design. He enrolled patients, his own
22 patients in the study. But to say he was somehow nefariously
23 twisting the study to favor Natera over Guardant, I think
24 that's pure speculation.

25 **THE COURT:** So why not produce his whole file? Why

1 not go through a thorough search of his files so we know one
2 way or the other? What does it look like in 2018, '19, '20,
3 '21, '22? Maybe there was no involvement, that it all
4 happened, as you say, once the study was closed and the stuff
5 started, you know, hitting the fan. I mean, I don't know that.

6 But the problem is now, you know, there's a lack of
7 confidence, an understandable lack of confidence when you
8 respond "Well, there's just no documents."

9 **MR. CANNON:** I get it, Your Honor. I understand the
10 concern, and we, you know, we should look at that.

11 Although the other side of the coin is Guardant was very
12 involved in the study. Guardant was in, you know, pretty
13 regular constant communication with the oncologist at NRG, and
14 we've gotten those documents now from NRG just this past month,
15 as Mr. Perloff said.

16 But I get Your Honor's concern. That is correct.

17 **THE COURT:** Go ahead.

18 **MR. BRAMHALL:** Your Honor, if I may. This is Andrew
19 Bramhall for Natera. Just a couple things.

20 I mean, I don't think we're opposed to this additional
21 discovery from the NRG or from Rutgers. Those subpoenas were
22 drafted and negotiated between Guardant and those third
23 parties. We weren't involved in that.

24 So we're not -- we didn't set the parameters for those.
25 That's up to them, and we're not opposed to having more

1 information here, because we don't have any reason to believe
2 that Dr. Hochster was anything but a concerned doctor reacting
3 to the news of the closure, and the fact that the study had
4 higher than expected false positives, excuse me, the assay.

5 And, Your Honor, in addition to that, there is evidence in
6 the record that's been produced from Dr. Morris. This is the
7 lead principal investigator from the NRG on COBRA, where he
8 says to Dr. Hochster he's been one of the best advocates for
9 the study.

10 Dr. Hochster is not biased. He wants the best for his
11 patients. He wants this field to move forward. He is integral
12 in this field. He is a preeminent oncologist in the GI space.
13 He's involved in this study. He enrolled his own patients, so
14 he clearly had, you know, stakes in this study. And he
15 reacted, it's true, very strongly to the closure and the news,
16 but the reality was he was reacting like everybody else, and he
17 was trying to salvage the study, Your Honor. And the idea that
18 it was his idea first to have these samples run on the Natera
19 assay, Signatera, is wrong.

20 In June of 2023, well before Hochster -- Dr. Hochster made
21 the same recommendation, the NRG PIs, this is Dr. Wolmark and
22 Dr. George -- and this is, Your Honor, 5 -- Exhibit or DI
23 582-15, which is Exhibit 14 to our opposition -- they made the
24 suggestion themselves. Those two scientists involved in COBRA
25 at the NRG said do we have tumor tissue to do a bespoke assay,

1 either Signatera or another assay by another company? That's
2 what they were suggesting. That's the logical idea and a
3 logical extension of, hey, this failed using the Guardant assay
4 because it has too many false positives. Where can we go? We
5 can go to an assay that didn't -- shouldn't have and doesn't
6 have the same false positive specificity issues.

7 So that was their idea, and he was having the same idea,
8 because it's the logical one.

9 **MR. PERLOFF:** Just a small point.

10 This, again, idea that he was merely a concerned doctor,
11 from the NRG production we don't have anybody else, anyone
12 immediately contacting, after the announcement, using foul
13 language, using scatological, you know, poo-poo language like
14 Dr. Hochster was. He was more than merely a concerned citizen,
15 more than just a concerned doctor. And the fact of that is
16 clear, because he concealed from everybody that he was talking
17 to, hey, by the way, I'm doing some work for Natera.

18 But, you know, again, we do not know what we do not know,
19 and it was because of it all starts with the very first thing
20 we did was to try to get the documents from Dr. Hochster
21 because they would have guided our subsequent discovery. And
22 what we got instead of documents was misrepresentation.

23 **THE COURT:** So if we were looking forward for a
24 moment, and knowing that we still have some time, what do you
25 propose to do - short of a blanket order excluding the COBRA

1 study or excluding Dr. Hochster's testimony about the COBRA
2 study - to get the information you need to, you know, to either
3 prove or not prove your suspicions? What do you need at this
4 point?

5 **MR. SCOLNICK:** Your Honor, I think we'd start with a
6 complete download by a third party of Dr. Hochster's emails,
7 incoming and outgoing, which is what we requested in the first
8 place and we should be entitled to.

9 But I don't think that addresses the problem. The problem
10 is that Natera and Dr. Hochster have made repeated false
11 statements to the Court, and this isn't a remedy for that. It
12 can't be that a party gets to make repeated misrepresentations,
13 claim that documents don't exist when they do, claim that
14 documents don't exist when both parties that are represented by
15 the same attorney know those documents exist because they
16 exchanged them.

17 So simply going back and reopening discovery and getting
18 us some limited remedy is not an appropriate sanction.
19 Something far more meaningful is appropriate here, and that's
20 why we're requesting for Dr. Hochster to be excluded and the
21 study itself to be excluded, Your Honor, and I think we're on
22 solid footing here.

23 **THE COURT:** Well, that may be. But if you could show
24 that there was some prejudice along with the misconduct that
25 resulted in that sanction -- and I do have to take into account

1 both the egregiousness of the conduct as well as what it is
2 that can be -- what's curable at this point.

3 **MR. PERLOFF:** I think Mr. Scolnick is --
4 There, you're back, Chase.

5 **MR. SCOLNICK:** I apologize for my connection, Your
6 Honor. I didn't catch that, the last exchange. I apologize.

7 **THE COURT:** I said that what I've got to take into
8 account is not only the egregiousness of the noncompliance and
9 one could argue of the less than forthrightness, to put it
10 charitably, with the Court and the counsel, and to everybody
11 else, but also what is the irreparable harm and what's the
12 prejudice here, before you invoke the ultimate sanction or the
13 sanction of exclusion.

14 And that's why I asked for -- one part of the question is
15 in terms of the make wholeness, what do you need? And
16 basically you need the complete set of documents. I don't know
17 how complete. You know, going back to 2017, that doesn't
18 sound, unless there's a basis for going back that far,
19 suggesting that you have some basis to believe that
20 Dr. Hochster was an influencer, and the whole way the study was
21 designed, this was designed in a way to just sort of get the
22 negative results, the unfavorable results, as opposed to sort
23 of reacting as the data came in. You know, I have a hard time
24 seeing that without some indication that that was in fact the
25 case.

1 **MR. PERLOFF:** Just along those lines, Your Honor --
2 Just, if I may, Chase.

3 Dr. Hochster, in his role, remember, is he would have been
4 reviewing the protocol before Rutgers participated in the
5 study. There's every reason to believe -- and, again,
6 especially given his relationship with these people, that he
7 may have taken a more active role, shall we say, in reviewing
8 and commenting on the protocol. We certainly would want to
9 find out about that, and it should be relatively simple.

10 **THE COURT:** By the way, did you depose the PIs of the
11 study?

12 **MR. PERLOFF:** No.

13 **THE COURT:** I mean, wouldn't that be a way to -- you'd
14 think -- I mean, yeah, I know you like to have documents in
15 advance, but, I mean, wouldn't that be an initiating question?

16 **MR. PERLOFF:** Yeah, it may be worthwhile, especially
17 once we get all of the documents from NRG. Again, I'm a
18 little -- a little concerned that we didn't get some of the
19 documents from NRG. And they, as the study designer, would
20 probably be in the best position to comment on it, because
21 there are some serious unanswered questions that the
22 Dr. Hochster production has left open for us.

23 **THE COURT:** And what's the scope of documents now that
24 you've asked and are awaiting from NRG?

25 **MR. PERLOFF:** We asked for, you know, their

1 communications with various people, including Dr. Hochster and
2 Natera.

3 **THE COURT:** Time limit or no time limit?

4 **MR. PERLOFF:** Yes, there was a time limit.

5 Again, they were very much playing on the: We're a public
6 nonprofit entity, so please have mercy on us, and we did. We
7 worked with them, and I believe it has that same basic time
8 frame of June of 2023 to March of 2024.

9 Their production did include a couple of earlier
10 documents, but I think that was because they were forwarded
11 during the right time period. So we might want to, on a
12 limited basis, expand that. But, again, the fact that we're
13 even having to do it I think is itself a large part of the
14 prejudice that Mr. Scolnick is correct to identify.

15 **THE COURT:** Well, and that prejudice, there's also the
16 monetary sanctions part, which is no small deal here, because
17 you've been now having to go through work that you may not have
18 had to have undergone had there been a forthright production in
19 the first place, and disclosure.

20 So I'm not saying there's no sanctions, and I'm not saying
21 there could be no other sanctions, but before we get to that I
22 want to know what else, in terms of further deposition work or
23 what else would you want to do.

24 **MR. SCOLNICK:** Well, Your Honor, let me express my
25 concern here, that just another production is not going to be

1 sufficient from Dr. Hochster. Because if he's going to be
2 believed, and there's little reason to believe him at this
3 point, but if he is to be believed, he said that he regularly
4 destroys emails. Now, we requested during the deposition that
5 Natera ask him to preserve his emails. They objected to that.
6 So those emails, if he did destroy them, if he was telling the
7 truth, then they're gone. We can't get those back, and that's
8 irreparable prejudice.

9 But in addition to that --

10 **THE COURT:** We don't know that. So one of the things
11 I would order is a full and complete search with forensic help
12 to go through. Because when he deletes, he's probably not that
13 sophisticated. His delete may be not be a true delete. I
14 don't know if there's a write-over or what.

15 **MR. SCOLNICK:** That's not what he testified to, Your
16 Honor. He said he double deletes. My recollection of his
17 testimony is that he double deletes all of his emails.

18 **THE COURT:** And if he deleted after his deposition,
19 for instance, and this all came to light, then that would raise
20 potential deliberate spoliation claims.

21 So I would like to know what the status of his computer
22 is. I want a full forensic search: What was his practice,
23 what's still there, what's not there, when was it deleted, what
24 was deleted. So you're going to get that, and you're going to
25 get the complete NRG production.

1 What else?

2 **MR. SCOLNICK:** Well, an additional concern I have,
3 Your Honor, with respect to prejudice is that we didn't have
4 this information when Natera argued this was relevant, when the
5 court agreed with our arguments that this was relevant, the
6 COBRA study inadmissible.

7 For example, we didn't know that when Natera characterized
8 him as a neutral and detached and honest expert, we didn't know
9 that he was secretly and surreptitiously going out and trying
10 to influence the same study that he was relying on, and then
11 lying to the investigators and not disclosing his true
12 financial relationship. That would be a relevant fact that we
13 would have brought before the Court. We can't do that now. We
14 can't undo the last three, four months that have happened.

15 We can't -- we also can't point the Court to
16 Dr. Hochster's emails that have now been produced not by him
17 but by other people, by Rutgers, that show that he had serious
18 concerns with some of Natera's arguments; for example, that
19 there is no clinical data. And without clinical data you can't
20 determine Reveal's performance. Without clinical data, you're
21 not able to tell how many false positives or whether there are
22 any false positives. That would have been a very important
23 fact. That's at odds with the same arguments that Natera made
24 to introduce this evidence. That's the same arguments this
25 court found persuasive several months ago.

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1 So this is additional prejudice that's very difficult to
2 undo at this point, Your Honor.

3 In addition, it's not just -- it's not just the production
4 of information that's been delayed. We based our entire
5 discovery plan on the assumption that Natera and Dr. Hochster
6 were behaving honestly. It now turns out that's not true. And
7 we got these documents, as Mr. Perloff said, after the close of
8 discovery.

9 So the ship has sailed with many of these witnesses,
10 especially third parties who we're negotiating more limited
11 sets of discovery with. It's going to be very difficult to go
12 back to those people now and ask for additional discovery, when
13 our understanding is that that would be far more limited.

14 So at this point we shouldn't be prejudiced. We shouldn't
15 have less time to prepare for trial. We shouldn't have any
16 less evidence than we otherwise would because of Natera's
17 dishonesty and Dr. Hochster's dishonest.

18 There should be little doubt that everyone on board knew
19 that those statements were false when Natera represented and
20 Dr. Hochster represented that they had no communications about
21 COBRA. Natera necessarily knew that that was false, because
22 they were parties to those communications, and they directed
23 Dr. Hochster to go out with the third parties, NRG, and have
24 further communications.

25 So those false statements are material. They are material

1 to the Court, the Court's decision to admit the evidence. They
2 are material to Judge Kim's decision to deny our motion to
3 compel discovery.

4 So at this point I think, again, some more meaningful
5 sanction is appropriate.

6 **MR. BRAMHALL:** Your Honor, if I may.

7 **THE COURT:** Can you think of thinking between the
8 extremes of no non-monetary sanction, as you would put it as
9 extreme, and on the other hand complete exclusion?

10 **MR. SCOLNICK:** Well, there's complete exclusion of
11 Hochster on the one hand, and there's complete exclusion of
12 COBRA on the other.

13 A more intermediate sanction, that I don't think would be
14 sufficient, would be I suppose a cautionary instruction,
15 instructing the jury that he provided mis -- false information
16 in his discovery responses, and that they are to consider his
17 testimony with great caution. That's typical for witnesses
18 that do far less. But anything less would be to deprive the
19 jury of necessary information to consider his credibility.
20 But, again, I don't think that's sufficient at this point. You
21 can't unring that bell.

22 **MR. BRAMHALL:** And, Your Honor, if I may --

23 **THE COURT:** And if Dr. Hochster's testimony were
24 excluded, that would -- would that essentially mean the
25 exclusion of the report?

1 **MR. SCOLNICK:** Of course it would, Your Honor, it
2 would.

3 And, again, I don't know -- I've never -- I assume I don't
4 have the experience of Your Honor, but I've never heard of a
5 case where a paid expert witness who has already been disclosed
6 and deposed goes out on one party's behalf and tries to
7 interfere with and manipulate and influence a study and is not
8 honest with the people who are running the study, and then that
9 party tries to introduce that study for their own benefit.
10 That's just fundamentally unfair. That can't be --

11 **THE COURT:** Well, it would have been fair if it was
12 demonstrated he had an influence on the study. Then that's
13 creating evidence from manipulating evidence that is then used
14 at trial.

15 If he made an effort and it went nowhere -- and let's say
16 the study was otherwise proved to be well designed. Are you
17 saying that should be excluded because a representative of one
18 party tried, but unsuccessfully, to influence the study?

19 **MR. SCOLNICK:** I think it puts us in an impossible
20 position, Your Honor, to try to disprove what kind of -- or to
21 prove what kind of influence that he had, when we weren't
22 involved in those conversations. We don't know what --

23 **THE COURT:** You have access to the study. That's why
24 I gave you that time. That's why we extended this.

25 I mean, the whole thing, I remember having this

1 discussion, like how long would it take, and you told me you
2 had to get through several layers, and it built in additional
3 time so that you could do that.

4 So to say, well, we had no way of doing it, I mean, the
5 only thing to do is get it from the mouth of Dr. Hochster. I
6 don't find that particularly persuasive.

7 **MR. PERLOFF:** Your Honor, we -- without a doubt we at
8 the same time that -- you know, the very, very first thing we
9 did with respect to discovery was send the subpoena, even
10 before the court officially opened discovery to Natera's
11 counsel. And then we followed that up by negotiating
12 subpoenas, which took far longer than we wanted, with NRG. We
13 began with NRG.

14 The Hochster -- I mean Rutgers subpoena we only decided
15 when they told this story about how he didn't have any
16 documents, and it just didn't seem plausible to us. And so
17 then we did that and that took some time.

18 You know, they both say -- both Rutgers and NRG were third
19 parties, were public institutions or non-profits, and it took a
20 long time. And it wasn't -- we were having regular
21 conversations and making concessions in order to get the
22 documents sooner rather than later, and we still got the
23 documents after the close of discovery, even though, you know,
24 we gave them more than 30 days time to respond.

25 So it hasn't -- and I don't think there's any terrible

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1 surprise that the best laid plans, especially with third-party
2 discovery, are difficult.

3 And, again, all of this new need to try to now figure out
4 what we still do not know has been necessitated by the
5 fundamental misrepresentations that they made to this court and
6 to us.

7 **MR. SCOLNICK:** Sorry to jump in, but I neglected to
8 mention in addition, Your Honor, an intermediate sanction would
9 be an adverse inference instruction as well, but, again, it is
10 our position that that would be still inadequate.

11 **THE COURT:** What would that adverse inference be in
12 this situation?

13 **MR. SCOLNICK:** Well, I'd have to think about that. I
14 think it would be a fair inference that he may have been --
15 that he influenced the scope or trajectory of the COBRA study
16 or the authors' decisions when he reached out on behalf of
17 Natera, lied to them by omission, failed to disclose his
18 relationship with Natera, and the payments he was receiving
19 when he denigrated Guardant and promoted Signatera and tried to
20 persuade them to move the samples over to Natera. This is just
21 unseemly.

22 **MR. BRAMHALL:** Your Honor, if I may. I mean, the
23 allegations are fast and furious here, and it's honestly hard
24 to cover all of them. But if I could just say a couple things.

25 I mean, Dr. Hochster, as we pointed out, is a preeminent

1 oncologist. He is a director of GI oncology at Rutgers. He is
2 a well-respected physician in this space. He's not -- he
3 doesn't need to stop being a doctor because he's also working
4 as an expert witness on this case.

5 **THE COURT:** So why didn't he disclose -- I mean, isn't
6 that obvious? If you're talking to the authors of the study,
7 that you're working for a company that's got a competing
8 product at issue, there's a lawsuit pending, why not disclose?

9 **MR. BRAMHALL:** It's a good question, Your Honor. I
10 mean, I think from his perspective the litigation is totally
11 separate. He's not a consultant or a work -- employee for
12 Natera. He's a doctor who advocates for patients.

13 In his view, and his opinion has always been that the
14 tumor-naive tests like Reveal have problems with false
15 positives, that was his opinion before we retained him in this
16 case, and he's continued to have it, and the COBRA trial has
17 borne that out. It's proof positive that he was right --

18 **THE COURT:** He's talking, and at some point
19 suggesting, you know, substitutions to save the study.
20 Wouldn't you think the ethical thing to do, without having to
21 consult on a whole lot of dictionaries or anything, is to say,
22 by the way, you know, you should know I am being paid by Natera
23 as an expert in their case.

24 **MR. BRAMHALL:** Your Honor, I think from his
25 perspective he was doing what was right for science, and I

1 don't think it was motivated, his suggestion at all, by the
2 work he's doing. He's a user of Signatera for his patients.
3 He's also a user of a Guardant test called Guardant 360, that
4 he testified about. He's not a partisan. He is a person
5 who -- a physician who picks the best tests for his patients,
6 and he was advocating to move this study to salvage it after it
7 failed, and, Your Honor, exposed patients, who did not
8 necessarily have CRC, to chemotherapy. Like this was a safety
9 issue as deemed by the NRG and the NCI, and that's why it was
10 shut down. That had nothing to do with Dr. Hochster.

11 The results that led to the failure and the termination
12 had nothing to do with Dr. Hochster. He reacted after the fact
13 to try to salvage the study that he had been involved with,
14 totally separate and independent from working on this case as a
15 physician enrolling patients.

16 **THE COURT:** Was he involved in the early process in
17 the design of the study or do you not know?

18 **MR. BRAMHALL:** I honestly, Your Honor, I do not know.
19 His institution is involved in the study, and his colleague --
20 he's the boss of Dr. Patrick Boland, as I understand it, the
21 superior, and Dr. Boland is one of the authors on the paper.

22 I've neglected to mention this before. The email where
23 there's discussion about Dr. Hochster being the best advocate
24 for the study, and this is before the termination, Your Honor,
25 just so you have it, is Exhibit N, docket than entry 578-15,

1 and this is the email where Dr. Morris is responding to
2 Dr. Hochster who is saying, you know, I'm so sorry about what's
3 happened. Is there anything we can do, and what can we learn
4 from this?

5 He actually -- Dr. Morris actually said: I would highly
6 value your wisdom and experience once the data are all out
7 there. He's -- he wants Dr. Hochster's involvement and his
8 wisdom because he's a preeminent person in this field, and he
9 shouldn't --

10 **THE COURT:** Shouldn't Dr. Morris know that, by the
11 way, he's on retainer with Natera?

12 **MR. BRAMHALL:** Honestly, he might have known, and I
13 don't know if he did, Your Honor, and I'm not going to
14 represent that he did. I think, sure, in an ideal world should
15 he, every time he interacts with somebody about these two
16 tests, say that he's working for Natera on litigation on issues
17 from 2021? Perhaps. But I think his focus is always on the
18 medicine, the science, and the patients, and maybe, you know,
19 not ideally -- not on this litigation and the work that --

20 **THE COURT:** Well, it still raises the question how
21 could he say that there are absolutely no documents
22 responsive -- that he forgot that he had communications. I
23 mean, all the things you're just telling me about the depth of
24 his relationship with Dr. Morris, and everything else, the boss
25 of the PI, and everything else, and his involvement of his

1 people, his closeness to the study, how could he say that he
2 forgot that he had any correspondence with them?

3 **MR. BRAMHALL:** And, Your Honor, I don't have a great
4 explanation for that.

5 I also believe his testimony. He's an older gentleman who
6 is doing a lot of things, seeing a lot of patients, very
7 involved. He oversees 15 or so hospitals in New Jersey. He's
8 a very busy man. Litigation consulting and expert witness work
9 and intersection with the legal world is not something that's
10 foremost in his mind, I think.

11 And I also wanted to address one other point, Your Honor.
12 What discovery has shown from COBRA is that far beyond what
13 Natera ever thought, Guardant was heavily, heavily involved at
14 every stage of the COBRA study. They had the data early. They
15 had the abstract early. They had the presentation early. They
16 were in constant contact with the PIs.

17 Now, it's very curious why they don't want to depose the
18 PIs now after, in February, telling Your Honor over and over
19 again they need the depositions of the PIs, they need documents
20 from them. For whatever reason they haven't actually sought
21 that discovery, and they don't seem to be really keen on it
22 today.

23 And we don't know what behind-the-scenes communications
24 have occurred since the time frame that we've gotten discovery
25 into.

1 And I'd just add -- could I add one other thing, Your
2 Honor just really quick?

3 **THE COURT:** One other thing, and then I have to ask
4 you a question.

5 **MR. BRAMHALL:** Okay. So on the study being relevant
6 to the performance of the test, the other thing that discovery
7 has shown is that the COBRA failure was a direct result, Your
8 Honor, of the performance of the test. And Guardant itself did
9 its own testing where it compared the test that was used in
10 COBRA and an updated test with better specificity - Your Honor
11 may recall that means less false positives - and it changed
12 multiple results. In fact, 4 out of the 16 patients in the
13 interim analysis were flipped from positive to negative.

14 The NRG, Dr. Hochster, all sorts of individuals involved
15 in this all concluded those are false positives. So it's a
16 direct bearing, Your Honor, more than we ever knew when we were
17 seeking the discovery, as to the issues with the test, and the
18 fact that Guardant recognized those issues and in 2023 rolled
19 out a whole new test that they told the NRG about in 2023: Oh,
20 hey, we fixed the problems with the false positives. Yeah, we
21 had these problems. There were these chip mutations. We were
22 getting false positives, but we fixed it so we should keep the
23 study going. But they didn't tell the NRG that until they had
24 these poor results, and the NRG had to shut the study down.

25 **MR. PERLOFF:** That's just a misrepresentation. I've

1 got to correct it. They've been saying that. It's beyond what
2 we're talking about here, but they keep -- they keep doing
3 things like this, Your Honor.

4 **THE COURT:** Frankly, it's neither here nor there.

5 **MR. PERLOFF:** Okay.

6 **THE COURT:** My question is, clearly, there was a duty
7 to produce documents. There's also less than complete, I won't
8 say it was false, but it was certainly -- risk being misleading
9 to say that this was brand new information, that Dr. Hochster
10 didn't have access, and this is, you know, the extraordinary
11 move to reopen discovery to put this in when in fact he had
12 access to this.

13 Now, I understand the data wasn't final, I understand all
14 that stuff, but that wasn't disclosed to me. Nobody told me,
15 well, he did have access, but because of the embargo, we can't
16 tell you, but we know he did have early access. Nor was there
17 any warning early on that, Judge, there's a study coming down
18 the line. We think it's significant. And if this study gets
19 released at some point within the next couple months, we may
20 move to reopen. None of that was disclosed to me. None of
21 that was disclosed to Judge Kim.

22 And so I'm not going -- I don't have to get into whether
23 that was a falsehood or not, but that was less than forthright
24 and below the standard that I would expect from counsel,
25 because then it caused everybody to scramble. Certainly I knew

1 nothing, and I know that you will say, well, Guardant knew this
2 was coming down the line, they were involved. But all this was
3 breached at the 11th hour causing me to disrupt my schedule, my
4 calendar schedule, and having to rule on things on a moment's
5 notice. And as you can tell, I'm not pleased with that. You
6 know, that's pretty low-grade lawyering, in my view.

7 In any event, I'm looking forward, and what I want to hear
8 from you, Mr. Bramhall, or one of your team, is a response to
9 the intermediate sanction of something like a cautionary
10 instructions, adverse inference instruction, something short of
11 complete exclusion. What's your response to that?

12 **MR. BRAMHALL:** Your Honor, what I would suggest is
13 that, you know, they want the full story, so do we. I would
14 suggest that we do whatever discovery Your Honor has in mind
15 that they're asking for: NRG deposition, maybe deposition of
16 the PIs, whatever else they're looking for in terms of filling
17 in the gaps in the production, and then we readdress this.
18 Because I think a lot of this speculative accusations they're
19 making about Dr. Hochster are just going to fall flat once we
20 have the full story.

21 **MR. PERLOFF:** Your Honor, apropos of that, let's be
22 sure, if you think this is appropriate, because I sure do, that
23 in addition to getting Dr. Hochster's actual production, that
24 as part of that they include Dr. Hochster's communications with
25 counsel during that critical time period when they said they

1 had no information.

2 We would also, I think, at a minimum need Natera's -- we
3 only, I think, received four or five documents from Natera as
4 part of their COBRA production. I'd like -- and when we made
5 those requests we didn't know that they were asking
6 Dr. Hochster to connect the dots for them. We'd like that as
7 well.

8 **THE COURT:** What are you asking for, their direction
9 to Dr. Hochster regarding the COBRA involvement or supervision?

10 **MR. PERLOFF:** It looks as though there were a few
11 people at Natera that Dr. Hochster was communicating with in
12 respect of COBRA, and we would like their -- I think it's fair
13 to get the production of documents from those people.

14 **THE COURT:** The requests that have previously been
15 propounded to Natera?

16 **MR. PERLOFF:** Yes but no. We agreed, based on Judge
17 Kim's order on our production, to produce documents sufficient
18 to show, and I'm not sure that this would have -- that what
19 we're asking for now would have fallen within that category.
20 In other words, I don't think we would have had reason to say
21 your direction to Dr. Hochster to interfere with this study,
22 right? That was kind of outside the realm of what we thought
23 was possible. So we'd like that. I think that's necessary.

24 And I would suggest, Your Honor -- again, I agree with
25 Mr. Scolnick, naturally, that all of this is putting extra

1 burden on us so close to trial to try to scramble to get the
2 things we should have gotten. But I would suggest you leave
3 open the final question of whether the terminating sanction is
4 appropriate until we see what more. At a bear minimum there
5 needs to be a meaningful sanction based on what we already
6 know, and I think it's more than enough to terminate his study
7 and his ability to testify.

8 Go ahead.

9 **MR. SCOLNICK:** Your Honor, if I could make one more
10 point, too. If the Court is inclined to reopen discovery in
11 some capacity, I would ask that the court limit that to
12 Guardant being able to take further discovery. Any depositions
13 will be Guardant's further depositions. Any further document
14 requests will be our further document requests. Anything
15 otherwise, allowing Natera at this point to take additional
16 depositions or additional discovery from a party, from an
17 nonparty would be to reward them for their misconduct.

18 **THE COURT:** I didn't perceive there was a request to
19 open discovery by Natera. I thought what we were talking about
20 is as a result of this non-disclosure and non-production, that
21 discovery would be extended in order to fix that problem.

22 **MR. SCOLNICK:** Right. Okay.

23 **THE COURT:** That's a one-way problem.

24 **MR. SCOLNICK:** Understood.

25 Just one more point, Your Honor. I agree with

1 Mr. Perloff. And as I said earlier, we think the record is
2 sufficient now for exclusion, for a more elevated sanction, but
3 at this point, at the very least we think that the record is
4 sufficient for a cautionary instruction, an adverse inference
5 instruction.

6 I understand the court's tentative position, if I
7 understood it correctly, that if there is evidence that they
8 actually influenced and changed the trajectory of the COBRA
9 study, then something more elevated would be appropriate. But
10 just from what we know now, just with the repeated
11 misstatements to the court, to Your Honor, to Judge Kim, to
12 Guardant, and knowing the misrepresentations, not just once or
13 twice, not just a slip of the tongue, but in writing and at
14 argument, that we think that these sanctions are appropriate.

15 And in addition to not disclosing the information to NRG's
16 co-authors, I just wanted to point out, of course we all know
17 and understand and appreciate that integrity of clinical
18 studies depend on the full and transparent disclosure of
19 information, including conflict-of-interest information. But
20 Dr. Hochster, who apparently is an investigator at some level
21 with the COBRA study, also failed to disclose.

22 **THE COURT:** Well, wait a minute. I didn't hear that.
23 Are you saying he was one of the investigators? I mean, he was
24 close to them, and some of them, you know, he had a
25 relationship. I didn't hear he was an investigator.

1 **MR. SCOLNICK:** So, Your Honor, he -- my recollection
2 of his testimony is he does consider himself -- he believes
3 he's an investigator, because he enrolled patients as part of
4 one of the enlisted universities, which is Rutgers. That's my
5 recollection of his testimony, so he is an author.

6 And we're talking about improper influence on the study.
7 He's not an author. I'm sorry, I misspoke. He did enroll
8 patients. So my understanding is that makes him an
9 investigator, certainly not at the level of Morris, but an
10 investigator.

11 So if we're talking about inappropriate influence, this is
12 someone who failed to disclose, while communicating with
13 Rutgers, his financial relationship, his paid expert work with
14 Natera while he was -- while he was enlisting patients, while
15 he was interacting with all of these people. He failed to
16 disclose to anyone at Rutgers his involvement, and that is not
17 only a violation of Rutgers' policy, but it's arguably a
18 violation of --

19 **THE COURT:** I'm going to defer -- and I think you all
20 are right, until I see what the field looks like and what the
21 impact really is -- the question of sanctions, because I've got
22 to calibrate sanctions to the facts of the case. And if
23 there's something irreparable or not, I can't make that
24 judgment at this point because we don't know exactly what the
25 field is. So I'm going to agree with both of you and you can

1 save your arguments at that juncture.

2 I do want to get Natera's response to Mr. Perloff's
3 suggestion that Dr. Hochster's communication with counsel be
4 part of the disclosure.

5 Response?

6 **MR. BRAMHALL:** Your Honor, I'm happy to address this.
7 Andrew Bramhall again for Natera.

8 I think, Your Honor, so to start with as an initial
9 matter, so we're in the very rarefied area here when it comes
10 to the experts. Prior to this, in terms of expert
11 communications, the agreement had been between the parties: No
12 communications with counsel were discoverable. So that's been
13 the operating assumption.

14 I understand, you know, if Your Honor is interested in
15 seeing those communications, we would submit that, one, it's
16 not necessary, and we should do the rest of the discovery to
17 show you there's no there there. But if that were to happen,
18 it would be an under -- an in-camera type of review, as opposed
19 to disclosing that to the other side.

20 I mean, I think this is all -- you know, the goal here is
21 clearly to exclude COBRA at all costs, and to exclude the fact
22 that their test failed. But we're happy to do whatever Your
23 Honor wants us to do to show that, you know, what we're doing
24 is aboveboard and that it should be legitimately included in
25 the case because it is highly relevant.

1 And, Your Honor, just quickly, in terms of the surprise.
2 We were surprised as anyone, and so was Dr. Hochster, that the
3 test failed. That's the issue. It's such a spectacular
4 failure and it was so unexpected, I don't think anyone saw it
5 coming.

6 So we apologize for the timing, Your Honor, but we
7 couldn't control that, and it was all -- it was dictated by the
8 NRG clinical protocol, and it was really a shock to everybody,
9 that a test could fail this spectacularly.

10 **THE COURT:** Well, I'm not talking about the surprise
11 of the test. I'm talking about the surprise of the timing of
12 wanting to introduce this into the case when apparently maybe
13 on all sides there was some, you know, advance knowledge that
14 this was coming down the line, that there was a problem that
15 was obviously known by August, and so it was sort of bringing
16 this up after deadlines had been set, trial had been set, and
17 on the assertion, on the representation that, well, this was
18 substantially justified; it was late because the thing just got
19 published and just came out, you know, two weeks ago, et
20 cetera, et cetera, late-breaking news. And now I find out it
21 wasn't quite as late-breaking. Yes, the actual publication and
22 maybe the finalization was late-breaking, but, you know, this
23 was the kind of thing that could have been anticipated and
24 talked about in advance saying, well, Judge, I know you've set
25 this discovery deadline, but we think there's an important

1 study coming on. We may want to introduce it. We may not want
2 to, I don't know. At least we could have dealt with it in
3 advance.

4 But in any event, what I'd like to do, I do want a full
5 download of Dr. Hochster's, as requested -- I'm assuming you
6 don't have to re propound something, right, Mr. Perloff? I
7 mean, you've asked for what you're going to request or do you
8 need to refine that some way?

9 **MR. PERLOFF:** I would like to just quickly review our
10 subpoena to Dr. Hochster. I believe it is sufficient. And if
11 they fully, you know, get a true image of his files and produce
12 all the responsive documents, I believe that will be correct.

13 If we could have just a few days to review what the
14 subpoena said, just to make sure there isn't anything that's
15 been raised by this that we would need to cover.

16 **THE COURT:** All right. Well, I'd like you to meet and
17 confer in light of my comments and see if you can fine tune
18 that.

19 Number 1, I'm going to defer and not approve at this point
20 production of Dr. Hochster's communications with counsel. I do
21 think that that, you know, if there's enough there, I think
22 that that's worth an in-camera review. I can always ask for
23 that. I don't see a need yet. I'd rather have you focus on
24 his file on the relative communications.

25 And I think that there ought to be some kind of

1 description of a process by somebody with knowledge, a forensic
2 person to say here's what was searched, sort of a procedural
3 thing to make sure that the search has been thorough, that any
4 deleted matters, you know, if they have been deleted, that
5 there's been an examination on whether those are recoverable or
6 not. So I want to see a robust production on his part and some
7 explanation by somebody with knowledge about the forensics, if
8 in fact we find that there's large swaths missing, and I want
9 some assurance that those are in fact unrecoverable at this
10 point.

11 **MR. PERLOFF:** Your Honor, could we -- what I would
12 propose is that within a couple of days the parties agree upon
13 a forensic examiner to conduct this, independent and at
14 Natera's cost and that we both agree upon, that can do exactly
15 what you just said.

16 **THE COURT:** Yes. Submit it within -- by Tuesday.
17 That's two days.

18 And you also wanted to -- well, you need to complete your
19 discovery still with respect to the NRG. You're awaiting that.

20 **MR. PERLOFF:** I'm going certainly do my best.

21 **THE COURT:** And there's something else besides --

22 **MR. PERLOFF:** Discovery on Natera.

23 **THE COURT:** So you're going to have -- I'd like you to
24 meet and confer and make a narrowly tailored --

25 **MR. PERLOFF:** Yes.

1 **THE COURT:** It sounds like it's really about any
2 communications with Dr. Hochster relative to the COBRA
3 intervention or involvement or something like that.

4 **MR. PERLOFF:** Yes.

5 **THE COURT:** That's two things. And then you have the
6 NRG, that's a third.

7 What else? Anything else?

8 **MR. PERLOFF:** It would be with respect to even if
9 there's not an in-camera review, we would request, and I don't
10 think it's unreasonable, for them to produce a log, privilege
11 log. That way we can better know whether, you know, that's the
12 easiest way to know if there's any there there of their
13 communications just during the, you know, time period of June
14 through, you know, January or whenever.

15 And there's one final thing, Your Honor, we would like in
16 order to be able to circle back with Rutgers to see if we've
17 missed anything. We've asked counsel whether they would allow
18 us to send Dr. Hochster's transcript to the general counsel of
19 Rutgers, and we would like their agreement. Certainly it's
20 hard to imagine how anything that he said would be confidential
21 from his own employer in terms of his involvement and his lack
22 of disclosure.

23 **THE COURT:** So what -- I'm not sure I understand. You
24 would send -- you would propose to send a transcript of his
25 deposition to Rutgers?

1 **MR. PERLOFF:** Yes.

2 **THE COURT:** And ask them to do what?

3 **MR. PERLOFF:** When we visited with the general counsel
4 of Rutgers after the deposition we asked if it were made
5 available would you be interested in seeing it? And he said he
6 would. He didn't ask for it, but he said if we were able to
7 send it to him, he would read it.

8 And we asked counsel, because you've marked it outside
9 attorneys' eyes only and confidential, can we make an exception
10 for the general counsel of Rutgers? So far they have said no.

11 We'd like to be able to do that.

12 **THE COURT:** And what would be the purpose of sharing
13 that with the general counsel?

14 **MR. PERLOFF:** Both so that we can fine tune any
15 further Rutgers to make sure we have everything that we want
16 and better understand, quite frankly, his disclosures
17 obligations to the university.

18 I don't know that now is the time to go into it, but
19 Dr. Hochster plays an important role in deciding what research
20 is done by Rutgers, and we already know that he has -- I think
21 the verb they used is "tabled" a study with Guardant, a new
22 one, and still has not disclosed his involvement.

23 **THE COURT:** But what does that have to do with this
24 case and the COBRA study?

25 **MR. PERLOFF:** He was basing it on COBRA. That's in --

1 that's one of the things we learned, and he wasn't telling --
2 he wasn't telling his colleagues, oh, the reason -- you know,
3 by the way, even though I really believe this, I should let you
4 know I'm being paid.

5 And that just gives us some pause. We'd like to be able
6 to follow up with Rutgers on that.

7 **THE COURT:** All right. Response?

8 **MR. BRAMHALL:** So, Your Honor, I mean, I think just at
9 one level this is getting deeper and deeper. And going to
10 Rutgers, I'll say, at least in my mind, raises concerns about
11 the purpose of all this.

12 But we don't have any objections necessarily to them
13 talking to Rutgers. It's not really our role to say anything
14 about it, other than at some point it starts to feel like a
15 smear campaign against a doctor who is trying to do the right
16 thing. But hopefully through all this discovery that you're
17 ordering, Your Honor, we'll show that there's no improper
18 influence. It's just a physician who is trying to do the right
19 thing.

20 On the forensic evidence, I mean, one thing we would ask,
21 and we can talk to them through a meet and confer, is that we
22 get some opportunity to review the image before it goes to
23 them. Because there is going to be a lot of patient private
24 information in his computer. I mean, it's going to be more,
25 I'm sure, than just that. It's probably going to be personal

1 information as well. So we can work this out for them. But I
2 think the notion of us just handing over a forensic image to
3 Guardant is very concerning, and so we'll have to talk about
4 that and see if we can figure out something reasonably --

5 **THE COURT:** Yeah, I'd like you to work that out,
6 because obviously I don't think Mr. Perloff is suggesting you
7 just hand it over without any review.

8 My main thing is we want to get -- we want to make sure we
9 understand what's available, what's not, what's been deleted
10 and what's not. So once I have that understanding, at least I
11 know where that's at.

12 So I'd like you to meet and confer on that, and the
13 forensic, and how you would handle procedurally maybe any
14 screening or vetting for privileged material, if there are any
15 such things.

16 I think the privileged log is a fair compromise at this
17 point. That will help me determine whether I need to look at
18 something if it comes -- you know, and which ones I would need
19 to look at, so I think that's a fair request. The time limit
20 would be communications between, what, June of '23 and you said
21 January of '24?

22 **MR. PERLOFF:** Yeah. I'd like to revisit that. It may
23 be appropriate to extend that a little bit, at least until the
24 time frame of the communications that they had about his
25 emails, so --

1 **THE COURT:** All right. Well, again, I'd like you to
2 meet and confer. But the idea of a privileged log I think is a
3 fair approach at this point.

4 And with respect to Rutgers, I'm not hearing an objection
5 in principle to sharing for eyes only, for general counsel's
6 eyes only. But I will warn that your description to me,
7 Mr. Perloff, begins to sound like something extremely
8 collateral, and this case is already, you know, sort of spread
9 in ways that I think are beyond the necessary.

10 And so I'm going to be very skeptical about bringing in
11 stuff about, you know, that's not directly relevant to the
12 COBRA study, trying to use, you know, 404-type behavior or
13 something, saying, well, look what he's done in these other
14 studies; he's out to shaft Guardant, and he's doing this and
15 this and this and it's just part of a pattern. I'm telling you
16 will right now I'm not going there.

17 **MR. PERLOFF:** I understand. To be frank, I don't want
18 to characterize Dr. Hochster's -- what Dr. Hochster said.
19 There were some questions that we had with the general counsel.
20 I wasn't comfortable characterizing his deposition. I just
21 wanted to send the transcript so he could look at it himself,
22 and whatever we bring in in this case will be tied to these
23 issues.

24 **MR. SCOLNICK:** And, Your Honor, one of the issues, of
25 course, is his bias and his motive, bias against Guardant, bias

1 in favor of Natera, and pursuant to *Davis -v- Alaska*, those are
2 never collateral issues.

3 So even if it's not directly tied to COBRA, if it's tied
4 to either party here, and we have good reason to believe that
5 it will be, we think that that's relevant, proper discovery and
6 admissible.

7 **MR. BRAMHALL:** Your Honor, there is such thing as
8 legitimate bias when you prefer a better performing test to an
9 interior test, but...

10 **THE COURT:** Well, we'll cross that bridge.

11 My only point is, yeah, there's bias and there's bias. I
12 mean, that's why we have 403, that's why we have 404(b), that's
13 why we have limits. And I'm just telling you right now that
14 you can demonstrate bias much more directly.

15 But what I'm hearing from Mr. Perloff, if I understand it
16 right, we're getting into collateral areas that are almost
17 tertiary, it seems to me. But I don't know that. Maybe you've
18 got something more direct in mind, so I'm not going to opine on
19 that. I'm just warning you that the tree only goes so far.

20 **MR. PERLOFF:** Understood.

21 **THE COURT:** All right. So I would like for you all to
22 report back to court and make sure we have a plan to go
23 forward, an agreed-upon plan. If there's not, then I can
24 resolve whatever disputes or maybe with Judge Kim's help
25 resolve any fine tuning if there is some dispute. I hope not.

1 I hope you can agree on this.

2 In terms of timing, we need to put a timeline on this. So
3 what are you suggesting?

4 **MR. PERLOFF:** Well, we're going to identify the
5 independent forensic examiner by Tuesday.

6 Chris, anybody who is familiar.

7 That process can take a week or two, maybe -- I don't want
8 to like say right now how long it will take them to gather that
9 snapshot.

10 And then if, in fact, Natera -- Natera's counsel are going
11 to do the review --

12 **MR. SCOLNICK:** I could jump in there.

13 I'd suggest that a third-party discovery referee should
14 conduct a review. And at this point, in light of all that's
15 happened, I think that would be appropriate.

16 **MR. BRAMHALL:** Your Honor, I think the concern would
17 be that third-party referee, whoever this is, is not going to
18 have the knowledge to review for relevance, not going to have
19 the knowledge to review for patient-specific private
20 information. I think there's a knowledge gap there that could
21 be problematic.

22 **THE COURT:** Well, the other thing we could do is also
23 either a privilege or some other kind of log to show what's
24 been excluded, and we can decide at that point whether there's
25 so much there that we need a third-party reviewer to look at

1 that, to examine that.

2 So it probably would make sense for you to at least also
3 meet and confer. If we do have to invoke a mechanism of a
4 discovery referee to look at that level of documentation, that
5 there's somebody that is there. I'm not going to invoke that
6 yet because I don't think we need to go there, given the
7 processes I'm talking about. But I think it's important that
8 you meet and confer now and see if you can agree upon a
9 theoretical person if we need to go to that resort. I hope we
10 don't.

11 But I do want to get this done. So why don't you see --
12 also agree on a timeline when this is done in advance,
13 sufficiently in advance of all the work we have to do in order
14 to prepare for trial.

15 Because I don't want to run into a situation where, you
16 know, we're a month away and then I hear back: oh, you know,
17 we're still not getting these documents, so now we've got to do
18 this and this and this, and we've got to subpoena X, Y and Z,
19 and now we're going to have to continue the trial date again.

20 **MR. PERLOFF:** And we have a *Daubert* hearing. That is
21 on him.

22 And when is it, in a month? I think --

23 **MR. LaVIGNE:** We have one *Daubert* hearing on
24 August 29th, yeah.

25 **MR. SCOLNICK:** How about let's see if we can resolve

1 all of those problems then.

2 **THE COURT:** Good.

3 **MR. PERLOFF:** Yeah.

4 **THE COURT:** I hope so.

5 So let's -- if you could insert that, include that in
6 your, I'll call it discovery plan, I'd appreciate it, so we all
7 know exactly what we're doing and when we're doing it. All
8 right?

9 **MR. PERLOFF:** Thank you, Your Honor.

10 **THE COURT:** All right.

11 **MR. LaVIGNE:** Just one --

12 **THE COURT:** Yes. Go ahead, Mr. LaVigne.

13 **MR. LaVIGNE:** I apologize, Your Honor. Just one
14 question. If we don't agree on the protocol, we'll inform the
15 court by the time you set. But how do you want us to proceed
16 in that scenario?

17 **THE COURT:** What I'd like you to do is send me a joint
18 letter saying, you know, you agreed on this, this and this, and
19 here are the three outstanding issues or one outstanding issue
20 that needs a resolution, and either I or Judge Kim will resolve
21 it for you.

22 **MR. LaVIGNE:** Thank you, Your Honor.

23 **THE COURT:** Okay. So I guess is the next time I'm
24 going to see you at the *Daubert* hearing. Is that our next
25 hearing in this matter or do we have something else scheduled?

1 **MR. PERLOFF:** I think that's the next one.

2 **MR. LaVIGNE:** Yeah, I believe August 29th.

3 **THE COURT:** Yeah, that's what I have, August 29 at
4 1:30.

5 All right. We'll see you then.

6 **ALL COUNSEL:** Thank you, Your Honor.

7 (Proceedings adjourned at 4:18 p.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

Dated: July 27, 2024

A handwritten signature in cursive script, appearing to read "Rhonda L. Aquilina", is written over a horizontal line.

Rhonda L. Aquilina, CSR #9956, RMR, CRR, CRC
U.S. Court Reporter